90-1285

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROBERT SHAVALIER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS FOR CHARLESTON COUNTY, SOUTH CAROLINA

PETITION FOR WRIT IN A CRIMINAL CASE

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QUESTIONS PRESENTED

I. Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution when the trial court refused to instruct the jury on Petitioner's theory of his defense to the charges.

II. Whether the jury instructions, which included a reading of Section 16-15-305 of the South Carolina Code of Laws, permitted Petitioner to be found guilty of disseminating obscene materials without proof that he had knowledge of the character of the charged materials as required by the First and Fourteenth Amendments to the United States Constitution.

III. Whether the jury instructions, which included a reading of Section 16-15-305 of the South Carolina Code of Laws, permitted Petitioner to be convicted of disseminating obscenity when the jury is instructed that the charged material is to be determined by its effect taken as a whole on an "ordinary" member of the community rather than an "average" member of the community in violation of the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CORPORATE AFFILIATION

No corporations are involved in this matter.

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OPINIONS BELOW

The decision of the South Carolina Supreme Court dismissing Petitioner's appeal was not reported and was filed on November 20, 1990. (Copy attached; appendix p. 1a.) The judgment of the Charleston County Court sentencing Petitioner in accordance with the jury's verdict is dated November 29, 1988. (Copy attached; appendix p. 3a.)

JURISDICTIONAL STATEMENT

The judgment of the Surpeme Court of South Carolina dismissing Petitioner's appeal was entered November 20,

1990. The writ of certiorari is requested pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment, United States Constitution, which provides:

   > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. The Fourteenth Amendment, Section 1, United States Constitution, which provides:

   > All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 16-15-305 of the South Caroline Code of Laws of 1976, as amended, which provides:

   (A) It is unlawful for any person knowingly to disseminate obscenity. A person disseminates obscenity within the meaning of this article if he:

   (1) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing,

picture, record, or other representation or description of the obscene;

(2) presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene;

(3) publishes, exhibits, or otherwise makes available anything obscene to any group or individual; or

(4) exhibits, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, present, rent, or to provide: any motion picture, film, filmstrip, or projection slide, or sound recordings, sound tape, or sound track, video tapes and recordings, or any matter or material of whatever form which is a representation, description, performance, or publication of the obscene.

(B) For purposes of this article any material is obscene if:

(1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;

(2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;

(3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.

(C) As used in this article:

(l) "sexual conduct" means:

(a) vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted, whether between human beings, animals, or a combination thereof;

(b) masturbation, excretory functions, or lewd exhibition, actual or simulated, of the genitals, pubic hair, anus, vulva, or female breast nipples including male or female genitals in a state of sexual stimulation or arousal or covered male genitals in a discernably turgid state;

(c) an act or condition that depicts actual or simulated bestiality, sado-masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;

(d) an act or condition that depicts actual or simulated touching, caressing, or fondling of, or other similar physical contact with, the covered or exposed genitals, pubic or anal regions, or female breast nipple, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an act of actual or apparent sexual stimulation or gratification; or

(e) an act or condition that depicts the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

(2) "patently offensive" means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

(3) "prurient interest" means a shameful or morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

(4) "person" means any individual, corporation, partnership, association, firm, club, or other legal or commercial entity.

(5) "knowingly" means having general knowledge of the content of the subject material or performance or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance.

(D) Obscenity must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or groups.

(E) As used in this article, "community standards" used in determining prurient appeal and patent offensiveness are the standards of the area from which the jury is drawn.

(F) It is unlawful for any person knowingly to create, buy, procure, or process obscene material with the purpose and intent of disseminating it.

(G) It is unlawful for a person to advertise or otherwise promote the sale of material represented or held out by them as obscene.

(H) A person who violates this section is guilty of a felony and, upon conviction, must be imprisoned for not more than three years or fined not more than ten thousand dollars, or both.

(I) Obscene material disseminated, procured, or promoted in violation of this section is contraband and may be seized by appropriate law enforcement authorities.

STATEMENT OF THE CASE

On November 28, 1988, a jury was empaneled before the Honorable Paul M. Moore, Judge, and trial was begun in Court of General Sessions for Charleston County, South Carolina in this matter. Petitioner was charged with disseminating obscenity in violation of Section 16-15-305 of the Code of Laws of South Carolina. Alcohol Beverage Control Agent John Ramey, testified that in the evening of March 16, 1988, he purchased a videotape. The person who sold Agent Ramey the videotape was not Petitioner. Agent Ramey gave the videotape to another law enforcement officer, Detective Phil Glynn, without viewing the videotape. Detective Glynn of the City of North Charleston Police Department had contacted Agent Ramey with a request that Agent Ramey purchase a particular videotape. Detective Glynn testified that his superior had ordered that the particular videotape at issue was to be purchased; therefore, Detective Glynn asked Agent Ramey to purchase this particular videotape. Detective Glynn never viewed the videotape. After Detective Glynn's testimony, the videotape was played to the jury. Thereafter the state rested its case.

The defense presented Dr. Clay Perry Drummond, a Clinical Psychologist, licensed to practice in the State of South Carolina. The trial court found Dr. Drummond to be a qualified expert witness, and he testified that, in his expert opinion, the videotape would not "appeal to the prurient interest" of the average adult applying contemporary community standards.

After the defense rested its case, the trial court refused to instruct the jury with the defense's five (5) requested instructions. (Copy attached; appendix p. 4a.) The trial court based its decision on the fact that the proposed instructions would be covered in the charge the court intended to give to the jury. (Copy attached; appendix p. 10a.)

The trial court charged the jury by reading the entire statute as part of its instructions. Immediately after the in-

structions were given, defense counsel again objected and requested that the proffered charges be given to the jury because, *inter alia*, of the repeated use of the term "deviant" by the court in the jury instructions. The trial court again refused to give the requested instructions and stated that it had not read the requested instructions or the memorandum in support thereof.

Petitioner was found guilty and sentenced to a three (3) year period of confinement and a fine of ten thousand dollars ($10,000.00); however, the trial court ordered that the sentence be suspended upon the completion of five hundred (500) hours of community service and ordered Petitioner to be placed on probation for three (3) years.

On appeal, Petitioner contended that the trial court erred in refusing to give the requested instructions. The Supreme Court of South Carolina dismissed Petitioner's appeal on the ground that the arguments in the brief were not supported by the exceptions. The five exceptions stated that the trial court erred by refusing the proffered instructions. (Copy attached; appendix p. 30a.)

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW BY REFUSING TO GIVE AN INSTRUCTION TO THE JURY CONTAINING THE DEFENSE'S THEORY OF THE CASE.

The First Amendment and the "right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets [the United States] apart from totalitarian regimes." *Terminiello* v. *Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895 (1949). "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972) (citations omitted).

This does not mean, however, that materials which are obscene cannot be regulated. It is well-established that material which is found to meet the tripartite definition of "obscenity" can be regulated. *See Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957), *overruled in part*, *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). As currently formulated, an expressive work is obscene if, and only if, all of the following are met:

> (a) [an] average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24, 94 S.Ct. at 2615 (citations omitted).

In this case, one theory the defense attempted to present to the jury was that there was a reasonable doubt whether this videotape violated this community's standards.

No expressive material can be presumed to be obscene until after an adversarial judicial determination; all expressive materials are presumed to be protected by the First Amendment when they enter the marketplace. *See e.g. Roaden* v. *Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 701 (1973) (the "setting of the bookstore or the commerical theater [both are] each presumptively under the protection of the First Amendment . . .").

Thus, this Court has insisted that any "regulation [of expressive materials] by the States [must] conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated [from obscene material] only by a dim and uncertain line." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963). When a state, such as South Carolina, decides to criminalize the dissemination of obscene material, this Court has required that those "regulations of obscenity scrupulously embody *the most rigorous procedural safeguards* . . . [because] the freedom of expression must be ringed with adequate bulwarks." *Id.* (citations omitted; emphasis added).

The importance that the Constitution places on an individual's right to free speech mandates that the procedural safeguards traditionally required in all criminal trials must be, at the least, more scrupulously observed when the alleged offense involves material presumptively protected by the First Amendment. The due process clause of the Fourteenth Amendment denies the states the power to deprive those accused of even traditional common-law crimes of their liberty unless the state had proven every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072 (1970). Obscenity cases are no different; the state bears the burden of proving all three elements of the *Miller-Roth* definition of obscenity to the satisfaction of the jury, not only to prove the elements of the crime, but also to prove that the charged material is not protected by the First Amendment. *See United States* v. *2,200 Paper Back Books*, 565 F.2d 566, 570 (9th Cir. 1977). Jury in-

structions that relieve a state of the burden of proof violate a defendant's right to due process of law. *Carella* v. *California*, 491 U.S. 263, ____, 109 S.Ct. 2419, 2420 (1989). Such instructions "subvert the presumption of innocence accorded to accused persons, and also invade the truth finding task assigned to juries in criminal cases." *Id.*

When there exists even a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside. *Francis* v. *Franklin*, 471 U.S. 307, 322, 105 S.Ct. 1965, 1975 (1985) n.8; *see also Bachellar* v. *United States*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316 (1970); *Leary* v. *United States*, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-46 (1969); *Stromberg* v. *California*, 283 U.S. 359, 51 S.Ct. 532 (1931). In a First Amendment context, an even higher standard should prevail; if there is any significant chance that the jury relied on an incorrect understanding of the law, the verdict must be set aside because the jury, if it is to fulfill its "truth finding task," must understand as clearly as possible the *Miller-Roth* definition of obscenity, which this Court has referred to as the "intractable obscenity problem." *Miller*, 413 U.S. at 16, 93 S.Ct. at 2610.

Even in the criminal cases that do not implicate First Amendment concerns, it is beyond question that a defendant has the right to have a jury determine his guilt or innocence. *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968). A jury's verdict finding a defendant guilty cannot stand if the instructions provided the jury do not require it to find each element of the charged offense under the proper standard of proof. *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979). Additionally, the "law is settled that in criminal cases a defendant is entitled to adequate instructions to the jury on his theory of defense, provided there is evidence to reasonably support the theory." *United States* v. *Hoopes*, 545 F.2d 721 (10th Cir. 1976) (citation omitted), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2675 (1975); *see also United States* v. *Washington*, 819 F.2d 221, 225 (9th Cir. 1987); *United States*

v. *Andrus*, 775 F.2d 825, 850 (7th Cir. 1985); *United States* v. *Fooladi*, 746 F.2d 1027, 1031 (5th Cir. 1984), *cert. denied*, 470 U.S. 1006, 105 S.Ct. 1362 (1985).

More important, a crimnal defendant is entitled to an instruction on his theory even if the evidence presented to support that theory is "weak, insufficient, inconsistent, or of doubful credibility." *United States* v. *Doubleday*, 804 F.2d 1091, 1095 (9th Cir. 1986), *cert. denied*, 481 U.S. 1005, 107 S.Ct. 1628 (1987). Additionally, the "general principle [is that] . . . 'a defendant is entitled to *a [jury] charge which precisely and specifically, rather than generally or abstractly, points to the theory of his defense'.*" *United States* v. *Lewis*, 592 F.2d 1282, 1286 (5th Cir. 1979) (citations ommitted; emphasis added).

The trial court stated that its general instructions on the burden of proof were sufficient, and it need not give Petitioner's requested jury instructions because the requested instructions were covered by the charge the court intended to give the jury. The court stated that the requested instructions would be included when the court read the statute under which Petitioner was charged to the jury. Nonetheless, it is well-established that when a proper request for an instruction on a criminal defendant's theory of defense is made, it is reversible error to deny "the defendant *[the] right to a full statement of the law from the court* . . . ," and the court must present the defense's theory of the case adequatley in its instructions to the jury. *Bird* v. *United States*, 180 U.S 356, 361, 21 S.Ct. 403, 405 (1901) (emphasis added); *see also United States* v. *Blane*, 375 F.2d 249, 252 (6th Cir. 1967), *cert. denied*, 389 U.S. 835, 88 S.Ct. 41 (1967). The failure to give such an instruciton violates a criminal defendant's right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments. *Fooladi*, 746 F.2d at 1030.

Thus, it has been held in cases where witness identification is at issue the trial judge must, at the defendant's request, instruct the jury on the reliability of eyewitness identification. *United States* v. *Anderson*, 739 F.2d 1254, 1257-58 (7th Cir.

1984). If a defendant presents even "slight" evidence on each element of an entrapment defense, the trial judge must, at the defendant's request, instruct the jury on entrapment. *United States* v. *Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 108 S.Ct. 883, 887 (1988) (citations omitted). "A parallel rule has been applied in the context of a lesser included offense instruction . . . ." *Id.* (citations omitted).

Petitioner's third requested jury instruction stated that:

> If you cannot determine from the evidence what the standards of Charleston County, South Carolina, are in regard to explicit sexual material, you must find the Defendant not guilty. (Appendix p. 7a.)

This instruction embodied one theory that the defense attempted to present to the jury. A central purpose of all jury instructions is to provide a framework for closing argument by counsel. *Fooladi*, 746 F.2d at 1030. In this case, the prosecution presented no evidence to demonstrate what community standards existed in the relevant community. The statute at issue defines the relevant community to be "the area from which the jury is drawn." S.C. Code § 16-15-305(E). The state is under no obligation to provide the jury with evidence of the relevant community standards. *Hamling* v. *United States*, 418 U.S. 87, 104, 97 S.Ct. 2887, 2900 (1974). Here, when the state made the strategic decision not to provide such evidence, one theory the defense chose to present was that the community standards were such that the videotape would not appeal to the prurient interest of an average member of the community; *i.e.*, the evidence cast a "reasonable doubt" on whether the videotape would violate community standards.

In order to bolster this theory, the defense presented the testimony of Dr. Clay Perry Drummond, a Clinical

Psycholgist licensed to practice in the State of South Carolina. As noted earlier, Dr. Drummond stated that in his expert opinion, based upon a reasonable degree of certainty, the videotape would not appeal to the prurient interest of the average adult applying contemporary community standards. In this manner, the defense raised a clear dispute about the community standards, and could properly argue to the jury that the prosecution had failed to prove beyond a reasonable doubt that this videotape was unacceptable under the local community standards, and, therefore, the jury was required to acquit Petitioner. However, *the jury was never informed that Petitioner was entitled to an acquittal if the evidence was such that it could not determine whether the community standards were violated.* All the trial court told the jury was that the prosecution had the burden to prove each element beyond a reasonable doubt.

In this case, the jury was never instructed "precisely and specifically" on the defense's theory of the case. *See Lewis*, 592 F.2d at 1286. No framework was provided for defense counsel's closing argument. *See Fooladi*, 746 F.2d at 1030. Finally, because the prosecution was not required to place evidence of community standards before the jury, there was a very strong possibility that the jury would conclude that *the failure of the defense to prove that the videotape was acceptable permitted them to find the videotape obscene and to find Petitiner guilty.*

This case is very similar to the issues which were presented to the United States Court of Appeals for the Sixth Circuit in *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988). In *Duncan*, the defendants were convicted of the making and the preparation of a tax return containing a false statement. *Id.* at 1105. One question raised on appeal was whether the district court's "refusal to give [requested] instructions usurped the function of the jury by depriving [the defendant] of his opportunity to present his theory of defense." *Id.* at 1117.

One of the defendants argued for a special jury instruction, which went into detail explaining that the taxpayer could not be found guilty of the charged crime if he had relied in good faith on the person who prepared his income tax return, because that good faith would completely negate the required mental element of willfulness necessary to the offense.[1] *Id.* at 1115.

In *Duncan*, the trial court gave a general instruction that undeniably covered the requisite mental state of "willfulness," which was an essential element of the prosecution's case. *Id.* at 117. The Sixth Circuit recognized that the trial court "believed that its general instruction on willfulness was sufficient . . . ," and that it was for defense counsel to argue the defense's lack-of-willfulness-due-to-reliance theory to the jury. *Id.* The Court of Appeals specifically held that a general instruction was improper stating that:

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[1] In full, the requested jury instruction was:

> Good faith is a complete defense to the charges in the Indictment since good faith on the part of a defendant is inconsistent with the existence of willfullness, which is an essential element of the crime. The burden of proof is not on the defendant, of course, since he has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted willfully as charged in the Indictment.
>
> However, a defendant will not be willfully doing wrong if he relied in good faith on an accountant whom he honestly believed competent, made a full and complete disclosure to his accountant of all material facts of which he had knowledge, and then acted strictly in accordance with the advice given to him by his accountant.
>
> Whether the defendant acted in good faith in relying on an accountant whom he honestly considered competent, and whether he made a full and complete disclosure to his accountant, and whether he acted strictly in accordance with the advise rendered to him by his accountant, are all questions for you to determine.

See Duncan, 850 F.2d at 1115.

> This approach was insufficient. When a proper request for an instruction on a criminal defendant's theory of defense is made, *it is reversible error not present that theory adequately in a full statement of the law. Id.* (citations ommitted; emphasis added).

In this obscenity case, the need for the requested instruction was critical because the prosecution was not required to put any evidence of community standards before the jury. *See Hamling*, 418 U.S. at 104, 97 S.Ct. at 2900. From the jury's perspective, it was told by the trial court that the prosecution bears the burden of proof on all the elements of the offense, *but the prosecution presented no evidence on community standards.* The jury then could easily be led to the conclusion that the contemporary community standards must be proven by the defendant and, if he fails to do so, then he could be found guilty.

When the defense took the initiative in presenting evidence of the community standards, the prejudice from the lack of the requested instruction was again increased because of the general burden-of-proof instruction. The jury was told that the burden of proof was on the prosecution; however, the prosecution presented no evidence on community standards. When the defense then presented its evidence of community standards, the jury may have believed that, if it was not convinced beyond a reasonable doubt that the community standards were compatible with the charged material, the jury must find the material obscene. The result was that the burden of proof was completely reversed and placed on Petitioner, in violation of the constitutional guarantees in the First and Fourteenth Amendment. *See Patterson* v. *New York*, 432 U.S. 197, 97 S.Ct. 2319 (1977).

The defense was trying to create a reasonable doubt in the minds of the jury as to how the community standards of Charleston County, South Carolina would relate to this particular videotape. In other words, if the jury could not find the videotape appealed to the prurient interest in light of the

community standards, then it was required to acquit the defendant. That was, and is, an undeniably correct statement of the law; if the prosecution fails to present evidence that is sufficient to convince the jury beyond a reasonable doubt, then the defendant must be acquitted. *See id.*

Many courts have found a similar requested instruction to be not only proper but necessary when requested. For example, in *Commonwelath* v. *Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (1978), the Supreme Judicial Court of Massachusetts discussed almost the identical jury instruction. The Court recognized that the prosecution was not required to put testimony before the jury of the relevant community standards; however, the Court went on to hold that:

> Of course, absent favorable expert testimony, the Commonwealth runs the risk that the trier of fact will be unable to arrive at a conclusion concerning [the relevant community] standards. *A defendant is entitled to rulings or instructions that, if the trier of fact cannot determine the commonwealth norms, the defendant is entitled to a finding in his favor . . . . Id.* at 1219 (emphasis added).

Similarly, in *State* v. *Kam*, 68 Hawaii 631, 726 P.2d 263 (1986) the Supreme Court of Hawaii held that an instruction to the jury stating that it must acquit the defendant if the jury could not find that the charged material was in violation of the community standards was a proper and necessary instruction. The rationale for this holding was that:

> Without a clarification such as that offered [by defendant's requested jury instruction], there exists a substantial likelihood that the juries in [obscenity] cases [would be] misled into not considering the issue of whether such standards do, in fact, exist. *Id.*

Obviously, if the prosecution presents no evidence, and the jury does not consider the specific question of the proper com-

munity standards but still convicts the defendant, then the prosecution is relieved of its burden of proof on that issue. Taken a step further, if the prosecution presents no evidence on community standards *but the defense does*, the jury is likely, if it considers the issue at all, to place the burden of proof on the defendant, again relieving the prosecution of its burden of proof on that issue.

Similarly, in another case, an Ohio Court of Appeals held that "[i]t was error for the trial court not to instruct the jury that if the jury could not find that the [material] breached the community standards as they existed at the time of the sale [of the charged material], then the jury must find the [defendant] not guilty." *State* v. *Burkhardt*, No. CA-7887, slip op. (5th Oh. Dist. Ct. App. Dec. 12, 1987) (1989 Ohio App. Lexis 4863). All the courts which have ruled on this issue, except for the court in this case, have found it necessary to give an instruction to the jury when requested by the defense.

The failure to give the instruction had the effect of permitting the jury to shift the burden of proof on the issue of the standards of the community in violation of Petitioner's constitutional rights. The failure to give the instruction denied Petitioner's right to have his theory of the defense explained to the jury. *See Bird* 180 U.S. at 361, 21 S.Ct. at 405. The failure to give the instruction provided defense counsel with no framework upon which to base a closing argument to the jury, implicating both Petitioner's right to a fair trial and his right to counsel. *See Fooladi*, 746 at 1030. When these errors of constitutional magnitude are properly considered in light of the special concerns necessarily involved when First Amendment material is involved, Petitioner's conviction cannot stand. This Court should grant the petition for certiorari.

II. SOUTH CAROLINA CODE § 16-15-305 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION BY PERMITTING A PERSON TO BE CONVICTED OF THE CRIME OF DISSEMINATING OBSCENE MATERIALS WITHOUT ANY PROOF OF THE ACCUSED'S KNOWLEDGE OF THE CHARACTER OF THE MATERIAL.

Over thirty years ago, this Court established the basic principle that no one could be convicted of an obscenity crime unless an element of scienter or knowledge is contained in the statute that criminalizes the obscene material. *See Smith* v. *California*, 361 U.S. 147, 80 S.Ct. 215 (1959). The statute under which Petitioner was convicted stated that it was a crime to "knowingly" disseminate obscenity. S.C. Code § 16-15-305(A). However, at the same time, the statute permitted a conviction by eliminating *any* mental element from the statute by defining the term "knowingly" to include:

> [H]aving general knowlege of the content of the subject material or performance *or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance.* S.C. Code § 16-15-305(C)(5) (emphasis added).

The second aspect of this definition permits a conviction without *any* knowledge by the accused of the character of the charged material. In that way, the South Carolina law permits strict or absolute liability in exactly the same way as the California statute that this Court found to be unconstitutional in *Smith*. This Court held in *Smith* that:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter.

> For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. *Smith*, 361 U.S. at 153, 80 S.Ct. at 218 (footnote omitted).

The South Carolina statute imposes the very burden that this Court determined to be unacceptable in *Smith*. South Carolina specifically requires all people to inspect the contents of all the material they sell or be faced with a presumption of that same knowledge. The only distinction between the statute here and the ordinance in *Smith* is that the statute here presumes knowledge while the ordinance in *Smith* contained no need to prove knowledge in any event. This is a distinction without a difference, because in neither case is any element of scienter required.

Recognizing this deficiency in the statute, Petitioner requested the following instruction to properly limit the reach of the South Carolina law:

> One of the essential elements the prosecution must prove beyond a reasonable doubt is the element of scienter or knowledge; that is, at the time of the alleged offense, the Defendant had knowledge of the character of the charged materials. If you find that the prosecution has not proven beyond a reasonable doubt that, at the time of the alleged offense, the Defendant knew the character of the charged materials, then you must find the Defendant not guilty. (Appendix p. 8a.)

This instruction tracks the language of this Court, speaking through then-Justice Rehnquist, when it held that it "is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributed, *and that he knew the character and the nature of*

the materials." *Hamling* v. *United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974) (emphasis added). This instruction was not covered by the other instructions given to the jury. The only instruction the trial court gave to the jury on this issue was the definition of "knowingly" as defined by the statute. That defintion, as demonstrated, violates the First and Fourteenth Amendments, and the unequivocal holdings of this Court. This Court should grant this petition for certiorari.

III. THE TRIAL COURT VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN AN OBSCENITY TRIAL WHEN IT PERMITTED THE JURY TO DETERMINE THE CHARGED MATERIAL'S EFFECT ON AN "ORDINARY" RATHER THAN AN "AVERAGE" MEMBER OF THE COMMUNITY.

The second requested jury instruction (contained in full in the appendix at p. 5a-7a) properly set forth the *Miller-Roth* definition of obscenity, and, using the subsequent decisions of this Court, further set forth explanations of each prong of the obscenity test. *See e.g. Pope* v. *Illinois*, 481 U.S. 497, 107 S.Ct. 1918 (1987); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 (1985); *Smith* v. *United States*, 431 U.S. 291, 97 S.Ct. 1756 (1977); *Pinkus* v. *United States*, 436 U.S. 293, 98 S.Ct. 1808 (1978). While the instructions given to the jury properly stated much of the law of obscenity, error resulted because the actual charge given contained extraneous and prejudicial material and at the same time made misstatements of the law that were of constitutional dimension.

One crucial error in the trial court's instructions, which was properly stated in the second requested instruction, regarded the impact of the charged material. The trial court read Section 16-15-305(D) as part of its charge, which stated that:

> Obscenity must be judged with reference to *ordinary* adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or groups. (Emphasis added.)

The charge contains numerous errors. No claim had ever been made in this case nor any evidence presented that the charged material, primarily involving heterosexual relationships, was designed for or primarily disseminated to chidren or a well-defined deviant group. There were no trial issues, therefore, that this subsection addressed, except possibly for the first nine (9) words. This instruction, not based on or in conformity with the evidence and issues raised at trial, was given in error. More important, the remaining portion of this subsection is not a constitutionally correct statement of the law. Defining "obscenity" by its effect upon an "ordinary" person is doubly incorrect. The decisions of this Court leave no room for doubt that the question of whether any given material is "obscene" depends upon whether it appeals to the "prurient interest" of an "average" member of the community. *See Miller*, 413 U.S. at 24, 93 S.Ct. at 2615.

Initially, to instruct the jury, as the trial court did, that *obscenity* must be judged by its impact on an ordinary member of the community, presumed that the material was obscene prior to jury's determination of that issue. As noted earlier, expressive material is "obscene," and therefore unprotected by the First Amendment to the United States Constitution, if and only if, "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . [and] the work depicts or describes conduct, in a patently offensive way . . . [and] the work, taken as a whole, lacks serious literary, artistic or political value." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615. Therefore, the trial court erred in its charge, first, because the charge misstated the law, and second when it refused Petitioner's second requested jury instruction, because that instruction would have properly stated the law the jury was required to apply to this case.

The court's charge substituting "ordinary" person for an "average" person was an additional constitutional error because that substitution changed the entire concept of the

Miller definition of obscenity. The term "average" connotes a "mean proportion, medial sum or quantity, *made out of unequal sums or quantities.*" Black's Law Dictionary (5th ed. 1979) (emphasis added). Thus an average person is a hypothetical construction, which would result if all the varying attitudes in the community, from the most conservative to the most liberal, could be distilled.

In contrast, an "ordinary" member of the community is any member who is not unusual. It is quite likely that each member of this jury thought that he or she was an ordinary member of the community. This Court has expressed its approval of giving the jury "[c]autionary instructions to *avoid subjective personal and private views in determining community standards* . . . [and] tell[ing] the individual juror that in evaluating the hypothetical 'average person' he is to determine the collective view of the community, as best as it can be done." *Pinkus*, 436 U.S. at 300-301, 98 S.Ct. at 1813 (emphasis added).

Further, the prejudice vistited on Petitioner was increased by the unnecessary and improper portion of the charge contained in Section 16-15-305(C)(1)(c). That subsection defines sexual conduct to include:

> [A]n act or condition that depicts actual or simulated bestiality, sadomasochistic abuse, meaning flagellation or torture by or upon a perons who is nude or clad in undergarments or in a costume which reveals the pubic hair, annus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed . . . .

This instruction was completely unnecessary and misleading, because there was no evidence to support a finding that the charged material contained any of such activity, and, therefore, the instruction was much broader than the charge. The jury could not help being misled. Without the requested

instruction to properly narrow the issues, and in light of the trial court's overbroad misstatement of law, the conviction violated Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

Finally, it must be remembered that one aspect of the defense's theory of the case was that this videotape would not appeal to the *average* person who lived within Charleston County. To that end, Dr. Drummond testified specifically about his expert opinion regarding the effect of the material on the "average" member of the community. The confusing, misleading and incorrect instructions given by the trial court had the effect of wholly negating Dr. Drummond's testimony that the videotape would not violate the community standards. The jury was, at best, given improper instructions on how to determine whether the material appealed to the average members of the community. Indeed, the jury was free to make the crucial determination of the nature of the charged material by judging its effect on an "ordinary" member of the community. If each member of the jury thought that he or she was ordinary, they were free to make that determination on their subjective feelings, contrary to all established law.

Petitioner's rights were violated because the jury instructions permitted each juror to evaluate the effect of the charged material on his or her own subjective standards rather than on the "average" member of the community. *See Pinkus*, 436 U.S. at 300-301, 98 S.Ct. 1813. This Court should grant the petition for certiorari.

CONCLUSION

For all the foregoing reasons, and especially to insure the fundamental rights contained in the First Amendment to the United States Constitution, as applicable to the states by the Fourteenth Amendment, Petitioner Robert Shavalier requests this Court issue a Writ of Certiorari to the South Carolina Court of General Sessions for Charleston County.

Respectfully submitted,

H. Louis Sirkin by Ehrle

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APPENDIX 1

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Robert D. Shavalier,

Appellant.

Appeal From Charleston County
Paul M. Moore, Special Circuit Judge

Memorandum Opinion No. 90-MO-292
Submitted June 8, 1990 — Filed November 20, 1990

AFFIRMED

Jay T. Goulden, of Charleston; H. Louis Sirkin and Edmund J. McKenna, of Sirkin, Pinales, Mezibov & Schwartz, both of Cincinnati, Ohio, for appellant.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and William Edgar Salter, III, all of Columbia; and Solicitor Charles M. Condon, of Charleston, for respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23 and the following authorities: Exceptions 1 and 2: *State* v. *Barwick*, 280 S.C. 45, 310 S.E.2d 428 (1983); *Hunter* v. *State*, 271 S.C. 48, 244 S.E.2d 530 (1978) (arguments in brief which are not supported by exception are not properly before

the Court). Exceptions 3 and 5: *State* v. *Barwick*, *supra*. Exception 4: *Hunter* v. *State*, *supra* (arguments in brief which are not supported by exception are not properly before the Court); *State* v. *Thompkins*, 263 S.C. 472, 211 S.E.2d 549 (1975). Exception 6: *State* v. *Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (issues not argued in brief are abandoned on appeal).

/s/ (illegible) C.J.
/s/ (illegible) A.J.
/s/ (illegible) A.J.
/s/ (illegible) A.J.
/s/ (illegible) A.J.

APPENDIX 2

SENTENCE

STATE OF SOUTH CAROLINA CASE NO. 88 GS-10-3180
CHARLESTON COUNTY

THE DEFENDANT ROBERT SHAVALIER IS COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS/COUNTY FOR A TERM OF 3 MONTHS/YEARS AND/OR TO PAY A FINE OF $10,000; PROVIDED UPON THE SERVICE OF 500 hrs. P.S. MONTHS/YEARS AND/OR PAYMENT OF $5,000.00; PLUS PAY/WAIVE COST AND ASSESSMENTS AS APPLICABLE*. THE BALANCE SUSPENDED WITH PROBATION FOR 3 MONTHS/YEARS

RESTITUTION
YES/NO

FOR PHYSICAL INJURY $_____
PROPERTY DAMAGE $_____

TO BE PAID _____

_____

TO THE CLERK FOR _____

OTHER CONDITIONS Not to engage with sale or rental of pornographic movies while on prob. Pay total fine 18 months.

DATE 11-29-88

/s/ PAUL M. MOORE
PRESIDING JUDGE

COST AND ASSESSMENTS
NON-WAIVABLE $_____
WAIVED $1,040.25
TOTAL $1,040.25

/s/ (illegible)
DEPUTY CLERK

[DULY CERTIFIED]

PAY TO VICTIM'S COMPENSATION FUND IF SUBROGATED
FORM 217 (3/86)

APPENDIX 3

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF GENERAL SESSIONS

THE STATE
vs.
ROBERT SHAVALIER
Defendant.

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

Defendant, Robert Shavalier, by and through his attorneys, respectfully request that this Court include in its instructions to the jury in this case the following proposed instructions.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. I.

Freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression under the First Amendment, which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly. A work is not to be condemned merely because it includes nudity or the portrayal of sexual activity. However, the constitutional right to free expression does not extend to that which is "obscene".

But as the Supreme Court of the United States has held:

> "[S]ex and obscenity are not synonymous . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in

> human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Roth v. *United States*, 354 U.S. 476, 487 (1957).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. II.

I will now instruct you on the definition of obscenity. The definition establishes a three-pronged test for obscenity and all three prongs of that test must be established beyond a reasonable doubt before material may be found obscene.

The first prong of the test for obscenity is whether the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest.

As here used, "prurient interest" means a shameful or morbid interest in sex and is reflective of an arousal of lewd and lascivious desires and thoughts.

The phrase "appeals to the prurient interest" refers to the effect or impact on the average person, that is, whether the material produces a shameful or morbid sexual response and is reflective of an arousal of lewd and lascivious desires and thoughts in the average person.

The fact that one portion or scene of a work may have some appeal to the prurient interest of the average person is not sufficient. Rather, the dominant theme of the work — that is, the work taken as a whole — must appeal to the prurient interest of the average person.

Use of the term "average person" means that you are to judge the material not on the basis of your individual taste, preference or opinion, or on the taste, preference or opinion of any other individual person. Rather, you shall judge the material by the standared of the hypothetical average adult person in the community. Children are not to be included in determining the standard of the average adult person.

Whether the material, taken as a whole, appeals to the

prurient interest of the average person of the community as a whole is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex. Contemporary community standards, in turn, are set by what is tolerated in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the work impresses an individual juror; rather, the work must be judged by its impact on the average person.

Therefore, the first prong of the test to be applied in determining whether given material is obscene is whether the material, taken as a whole, appeals to the prurient interest of the average person, applying contemporary community standards.

The second prong of the test for obscenity is whether the material depicts or describes, in a patently offensive way, sexual conduct of the following kinds: vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted, and masturbation. In judging whether those types of sexual conduct are depicted or described in a patently offensive way, however, you must not condemn by your own standards, if you believe them to be stricter than those generally held; and you must not excuse by your own standards, if you believe them to be more tolerant than those generally held. Rather, you must measure whether the material is patently offensive by contemporary community standards.

Patently offensive means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

Contemporary community standards, as stated before, are those established by what is generally tolerated in the community as a whole; that is to say, by society at large or people in general; and not by what some groups of persons may believe the community as a whole ought to tolerate or refuse to tolerate. It is a matter of common knowledge that customs

change and that the community as a whole may from time to time find tolerable that which was formerly intolerable.

The third prong of the test for obscenity is whether the material, taken as a whole, lacks serious literary, artistic, political and scientific value. An item may have serious value in one or more of these areas even though it portrays explicit sexual conduct, in which event the item would not be obscene under the law.

The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in the material, but whether a *reasonable person* would find such value in the material as a whole.

Those, then, are the three prongs of the test for obscenity. All three of the prongs must be established beyond a reasonable doubt before the material in question can be found to be obscene. If any one of them is not met, the material would not be obscene within the meaning of the law.

Miller v. *California*, 413 U.S. 15 (1973); *Pinkus* v. *United States*, 436 U.S. 293 (1978); *Smith* v. *United States*, 431 U.S. 291 (1977); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 (1985); *Pope* v. *Illinois*, ____ U.S. ____, 107 S.Ct. 1918, 1921 (1987); § 16-15-305 of the South Carolina Code of Laws (1976) as amended.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. III.

If you cannot determine from the evidence what the standards of Charleston County, South Carolina, are in regard to explicit sexual material, you must find the Defendant not guilty.

Commonwealth v. *Trainor*, 374 N.E. 2d 1216, 1219 (Supreme Judicial Court of Massachusetts, 1978) (copy attached).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. IV.

One of the essential elements the prosecution must prove beyond a reasonable doubt is the element of *scienter* or knowledge; that is, at the time of the alleged offense, the Defendant had knowledge of the character of the charged materials. If you find that the prosecution has not proven beyond a reasonable doubt that, at the time of the alleged offense, the Defendant knew the character of the charged materials, then you must find the Defendant not guilty.

Smith v. *California*, 361 U.S. 147 (1959); *Hamling* v. *United States*, 418 U.S. 87 (1974); § 16-15-305 of the South Carolina Code of Laws (1976) as amended.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. V.

I instruct you that proof that the Defendant knew that x-rated or adult motion pictures were available for sale at the place where the offense allegedly occurred is not, by itself, sufficient to prove that the Defendant had knowledge of the character of the charged material. Thus, if you find that there was no additional credible evidence presented tending to show the Defendant's knowledge of the character of the charged material, then you must find the Defendant not guilty. If, on the other hand, you find that there was additional credible evidence presented tending to show the Defendant's knowledge of the character of the charged material, you still must decide whether, upon consideration of all of the evidence, you are convinced beyond a reasonable doubt that the Defendant, in fact, knew the character of the charged material at the time of the alleged offense.

Illinois v. *Hart*, 101 Ill.App. 3d 343, 427 N.E.2d 1352 (2d Dist. 1981 — copy attached).

Respectfully submitted,

STONEY & GOULDON

By _____
RICHARD S. W. STONEY
Attorneys for Defendant

Charleston, South Carolina
November ____, 1988

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF GENERAL SESSIONS
88-GS-10-3180
November 28 and 29, 1988
Charleston, South Carolina

THE STATE,

vs.

ROBERT D. SHAVALIER,

BEFORE:
THE HONORABLE PAUL M. MOORE, Judge; and a jury

EXCERPTS FROM THE TRANSCRIPT
OF THE PROCEEDINGS
(JURY INSTRUCTIONS)

[210] THE COURT: The usual charge, gentlemen, plus the statute. That's just about — of course, I'll explain to the jury direct evidence and, of course, circumstantial evidence, how the State goes about proving their case and all that. The perfunctory charges, and you know where I stand on those.

As to these requests to charge, in numbers in six — I believe it's six, isn't it? They weren't numbered. Are there six or five? Five, I believe.

MR. SIRKIN: There were five.

THE COURT: I've already gone over those. They are covered in my normal charge, and that will be it, gentlemen. I refuse to charge them because it will be covered.

* * *

THE COURT: [255] All right. Madame Forelady and ladies and gentlemen of the jury, of course, the defense has rested now, and you've heard summation [256] of counsel. It now becomes my duty to charge you the law applicable in this case.

Now this indictment, which I hold in my hand, of course, charges the defendant with the crime which I read to you and published to you at the outset of this trial. He has pled not guilty. Now this indictment here, which I hold in my hand, is not evidence. It's not to be considered by you as evidence at all. It's merely the tool or instrument by which is required of the State to charge a person with an alleged crime. That's what it's for. Nothing else.

Now, ladies and gentlemen, to this indictment the defendant pleads not guilty. That always places the burden of proof upon the State of South Carolina, represented by your Solicitor, or his assistants, to prove his guilt beyond a reasonable doubt. Because it is the law of the state and, insofar as I know, the law of every state in the Union, that everyone — every defendant who comes into this court, regardless of the enormity of the charges made against him, he is always presumed to be innocent of that charge until or unless that presumption of innocence is removed by evidence satisfying you, the jury, of his guilt beyond a [257] reasonable doubt.

Now the term reasonable doubt means exactly what that term implies. It does not mean just any sort of a doubt because you and I know that from our everyday experiences in life that anyone can have any sort of a doubt about every matter that arises, regardless of how serious the matter may be.

The term reasonable doubt — excuse me. Starting the same thing I did yesterday. I ask you to pardon me. The term reasonable doubt means exactly what the term implies. It's a reasonable doubt. And the defendant which I prefer — or as to the definition which I prefer that a reasonable doubt is is a substantial doubt for which a person honestly seeking to find the truth can give a reason.

Now under the Constitution of the State of South Carolina, you jurors alone are the sole judges of the facts in this case. As I stated, ladies and gentlemen, I don't know — I've got the wrong portion here. That's the reason I'm having trouble.

Ladies and gentlemen, I charge you further that it is a car-

dinal and important rule of law that a defendant in a criminal action, regardless [258] of the nature of the charge against him, is never required to prove himself innocent. He will always be presumed to be innocent of the crime for which he is charged until his guilt has been proven by evidence which satisfies you, the jury, of that guilt beyond a reasonable doubt.

Now this presumption of innocence does not cease when you retire to the jury room; but it remains with him from the time of his first appearance in this court and throughout his trial, throughout your deliberations, and until and unless you reach a verdict of guilt, based upon the evidence which satisfies you of that guilt beyond a reasonable doubt.

Now our Supreme Court has said that this presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant, and it remains with him and assigns him to that class, the innocent, until that presumptive robe of righteousness has been stripped from his body by evidence satisfying you the jury of that guilt beyond a reasonable doubt.

And so, ladies and gentlemen, that's not a mere legal phrase. That's not just a saying. But it is a right which all of us have. This [259] defendant and everyone else. I charge you that the defendant is entitled to any reasonable doubt arising out of the whole case, or arising out of any defenses that may have been set up by him.

If upon the whole case you have a reasonable doubt as to the guilt of the defendant, you must give him the benefit of that doubt; and under those circumstances he would be entitled to an acquittal at your hands.

Now, I do not mean, ladies and gentlemen, by the term reasonable doubt that it is some whimsical doubt, nor a slight doubt. It's not a weak doubt. It's not an imaginary doubt. It is none of those things, but it is a substantial doubt arising out of the evidence or the lack of evidence for which a person honestly seeking to find the truth can give a reason. If you have such a doubt in your mind, it is your duty to acquit the defendant.

You are the sole and only judges of the facts in this case. It has been my duty to rule upon the admissibility of the evidence. The probative value of that evidence is for you. It is your duty to weigh the evidence, to consider the evidence, and to make a determination of how much or who you're going to believe.

[260] It is for your to say, based upon the evidence which you heard from this witness stand, and from the exhibits which will be given to you, what the whole truth is in this matter. Now if through something that I have said or something that I've done or some ruling that I've made in the trial of this case you have received some impression about how I feel about the evidence, you erase that from your minds, disspell that from your minds, because that's not my job, ladies and gentlemen. That's your job.

You are the only judges of the facts, and as such you must pass upon the credibility or the believability of the witnesses. In considering that, you may take into consideration the interest that any witness has, the bias or prejudice that any witness has, the opportunity for observation that the witnesses had, the demeanor of the witness, how they appeared to you on the witness stand, and anything that I have permitted to go into that record that will aid and assist you in finding the truth, that being your job.

And I say to you ladies and gentlemen that you may believe everything that a witness says. You may believe a part of what he or she [261] says and disbelieve a part of what he or she says. You may not do that, however, arbitrarily; but only if there is a sound reason in the record for you so doing.

It is your job, ladies and gentlemen, to find the truth in this matter, whether it comes from witnesses for the State or witnesses for the defendant, or from both. Your job being to find the truth. Having thus determined what the facts are, you must then apply the law as I charge it to you to the facts as you find them to be.

Now, ladies and gentlemen, in this case, of course, the defendant has a right to require the State to prove him guilty beyond a reasonable doubt and he does not have to testify.

And now I will charge you the law as that is applicable in this case.

I tell you ladies and gentlemen that the fact that the defendant, or that a defendant, does not testify in his own behalf, any circumstances or in any manner whatsoever, the fact of any defendant to take the witness stand or offer testimony or testify on his own behalf does not create any presumption against him whatsoever.

And I charge the jury now that you must [262] not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into your discussions or deliberations in any manner whatsoever because, as I've previously told you, the burden is upon the State to prove the defendant guilty — prove the defendant's guilt, of the defendant, beyond a reasonable doubt.

Now just by way of illustration only, it would be highly improper for any member of the jury to go to the jury room and say, "Oh, he's guilty. He didn't take the witness stand. He didn't swear." He doesn't have to. And you cannot hold that fact against him; and it's not to be even considered in your deliberations.

Now, ladies and gentlemen of the jury, just how does the State prove its case? There are two kinds of evidence, direct evidence of a fact, such as the testimony of persons who have received its existence by means of their senses. Where I hear something, or where I see something, or where I smell something , or taste something. That's direct evidence. Such as, where a person sees a crime committed and comes into the court and testifies as to what he saw.

By indirect evidence or circumstantial [263] evidence is meant the proof of some other fact or facts from which, taken either singularly or collectively, the existence of the particular facts in question may be inferred as a necessary consequence.

A crime may be proven by circumstantial evidence, as well as by direct evidence; and the State can rely partly on direct evidence or partly on circumstantial evidence, or the State may rely upon either or both circumstantial evidence — circumstantial evidence is good, provided it meets the legal test.

To the extent that the State has relied upon circumstantial evidence, it must prove all of the circumstances relied upon beyond a reasonable doubt. They must be wholly and in every particular perfectly consistent with one another, and must point conclusively — that is, to a moral certainty — to the guilt of the accused to the exclusion of every other reasonable hypothesis. That is, they must be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused.

In other words, in the consideration of circumstantial evidence, you the jury must seek some reasonable explanation thereof, other than the guilt of the accused; and if such reasonable [264] explanation can be found, you cannot convict upon such evidence.

I charge you further that the mere fact that the circumstances are stongly suspicious and the defendant's guilt is probable, it is not sufficient to sustain a conviction because proof offered by the State must exclude every reasonable hypothesis except the guilt of the defendant and must satisfy you, the jury, beyond a reasonable doubt.

Now the two terms or phrases beyond a reasonable doubt and proof to a moral certainty are synonymous. They are the legal equivalent of each other. These phrases denote, however, a degree of proof as distinguished from absolute certainty, and the reasonable doubt that the law in its mercy gives to the benefit of the accused is not a slight doubt nor a weak doubt, but it is a serious, strong, well-founded doubt as to the truth of the charge.

Now, ladies and gentlemen, the defendant in this case, of course, has been charged in the indictment, which you will have in the jury room, with the crime of dissemination of obscene material. And, of course, our Legislature has saw fit to pass a statutory law in regard and regarding the dissemination of obscene material in this state.

[265] Section 16-15-305 states that: It is unlawful for any person knowingly to disseminate obscenity. A person disseminates obscenity within the meaning of this article if he:

(1) Sells, deliver or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record, or other representation or description of the obscene.

(2) Presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene.

(3) Publishes, exhibits or otherwise makes available anything obscene to any group or individual, or

(4) Exhibits, presents, rents, sells, delivers or provides or offers or agrees to exhibit, present, rent or to provide any motion picture, film, film strip or projection slide, or sound recording, sound tape or sound track, video tapes and recordings, or any matter or material of whatsoever form which is a representation, description, performance or publication of the obscene.

(b) For the purpose of this article any material is obscene if,

(1) For the average person, applying [266] contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct, specifically defined by Subsection (c) of this section — which I will get to in a minute or two.

(2) The average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex.

(3) To a reasonable person the material, taken as a whole, lacks serious literary, artistic, political or scientific value, and

(4) The material, as used, is not otherwise protected or privileged under the Constitution of the United States or of this state.

(c) As used in this article,

(1) Sexual conduct means

(a) Vaginal, anal or oral intercourse, whether actual or simulated, normal or perverted, whether between human beings, animals or a combination thereof.

(b) Masturbation, excretory functions of a lewd examination — or exhibition — vulva or female breast nipples, in-

cluding male [267] or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernible turgid state.

(c) An act or condition that depicts actual or simulated bestiality, sadomasochistic abuse, meaning flagellation or torture upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples or the condition of being fettered, bound or otherwide physically restrained on the part of the one so clothed.

(d) An act or condition that depicts actual or simulated touching, caressing or fondling of or other similar physical contact, whether covered or exposed genitals, pubic or anal regions or female breast nipples, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an actual or — in an act of actual or apparent sexual stimulation or gratification; or

(e) An act or condition that depicts the insertion of any part of the person's body, other than the male sexual organ, or of any object into another person's anus or vagina, [268] except when done in part as a recognized medical procedure.

(2) Patently offensive means obviously and clearly distinguishable, objectionable, repugnant, displeasing, distasteful or obnoxious to contemporary standards of decency and the propriety within the community.

(3) Prurient interest means a shameful or morbid interest in nudity, sex or excretion, and is reflected of an arousal of lewd, lascivious desires and thoughts.

(4) Persons means any individual, corporation, partnership, association, firm, club or other legal or commercial entity.

(5) Knowingly means having general knowledge of the content of the subject material or performance, or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance.

(d) Obscenity must be judged with reference to ordinary adults, except that it must be judged with reference to

children or other especially susceptible audiences or clearly defined deviant sexual groups, if it appears from the character of the [269] material or the circumstances of its dissemination to be — excuse me. I want to make a note here. If it appeas from the character of the material or directed to children or such audiences or groups.

(e) As used in this article, community standards used in determining prurient appeal and patent offensiveness are the standards of the area for which the jury is drawn.

(f) It is unlawful for any person knowingly to create, buy, procure or possess obscene material with the purpose and intent of disseminating it.

(g) It is unlawful for a person to advertise or otherwise promote the sale of material represented or held out by them as obscene.

I charge you further that obscene material, of course, disseminated, procured or promoted in violation of this section is also contraband and may be seized by the appropriate law enforcement authorities.

Now, ladies and gentlemen, that is the statutory law, of course, of this state. And, of course, I have charged you that law.

Now, ladies and gentlemen, I am not concerned with what your verdict may be. It may be, [270] of course, one of two things. And the order in which I give them to you has no bearing on how I feel about this case or the evidence, ladies and gentlemen. I couldn't, of course, tell you both forms of the verdict at the same time to save my life, so I have to give them to you in some order, so pay no attention to the order in which I give them to you. You may find the defendant guilty or not guilty. And that is your responsibility.

Now, ladies and gentlemen, in the normal and ordinary course of business and in the normal and ordinary course of our lives, we accommodate the people that we meet in the street, our neighborhood people with whom we do business, our friends. Today you and I are not on a normal pursuit of our lives. We are here today, under the solemn oaths which

we have taken to do our duty and to see that justice is done in this court.

Now I notice that there's a lot of you, of course, held up your hand and said you had never been in a court before; and I know that you have noticed that people refer to me as Your Honor. They do not speak to Paul Moore when they say that. That speak of the position which I hold because, as I sit here presiding over your court as your [271] Circuit Judge, I hold in my hands the honor of the State of South Carolina and Charleston County.

And when you were selected and you took the solemn oath which you have taken, you became the triers or the judges of the facts, as you have become in this case. You must now share with me that awesome responsibility; and now you hold in your hands the honor of your county and our state. I would not have that soiled, nor would you.

I'm sure, ladies and gentlemen, that you realize well that you and I have no friends to reward. We have no enemies to punish. Our job is to do just what our oaths require us to do, and that is to see that the defendant and the State of South Carolina have a fair and impartial trial, and that the verdict speaks the truth.

Now whatever your verdict is, ladies and gentlemen, it must be the verdict of each and every one of you. It cannot be the verdict of some of you. You must be unanimous in your verdict, and until all of you have agreed you cannot write a verdict.

When you have all agreed, Madame Forelady, on the back of this indictment you will — where it says verdict and foreman of petit jury, you will [272] write either guilty or not guilty and sign your name for the whole jury.

Now, ladies and gentlemen, whatever your verdict is, it's not to be based upon sympathy. You're not to concern yourselves with the consequences of your verdict, so long as it speaks the truth.

Now, ladies and gentlemen, I am required to send you to the jury room. You do not start your deliberations at this time

until I have sent to you this indictment, along with those exhibits; and when I send those in to you, of course, you may start your deliberation.

When you've reached a verdict, you knock on the door, and we'll be glad to receive you. Now do not start your deliberations because I must make inquiry of counsel at this time of something that I may have left out or additional requests, which I may agree to or not, I don't know; but I must give them that opportunity.

So I'll ask you at this time to go to the jury room. Take the jury to the jury room.

THE CLERK: Do you want the alternate to stay out?

THE COURT: Just let the alternate remain [273] until I make this decision. When I send this material in there, the alternate will come back in here and take a seat with the remaining jurors.

(The following takes place outside the presence of the jury.)

THE COURT: Gentlemen, y'all brought up a point, and I had not caught it when I went over the statute; and there was objections raised about using the word deviant, am I correct?

MR. SIRKIN: That's correct, Your Honor.

THE COURT: All right. In (d) on Page 70, it says: Obscenity must be judged with reference to ordinary adults, except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant . . ." — and so the word is used in the statute.

Now I know that I said I would make a corrective — but I don't think I need a correction since the word deviant — you objected to him using that in his summation to the jury while ago.

MR. SIRKIN: Your Honor, if I could be heard, I don't know which order you want us to go in —

THE COURT: It really — I'll listen to you first. You're the one that made the objection.

MR. SIRKIN: All right. Your Honor, the reason [274] I made the objection was is that there's been no evidence that this material was designed for anybody other than the average, ordinary adult. And it says that obscenity must be

judged with reference to ordinary adults, except it must be judged in reference to others if it appears from the character of the material that it appeals to a clearly defined deviant sexual group.

There's a lot of language in this particular subsection (d) that is, in fact, not applicable to the evidence in this particular case; and I do object to the Court giving the instruction in full, reading that entire paragraph Number (d) to the jury because I don't think it's applicable to the facts of this case and should have stopped at "must be judged with reference to ordinary adults."

And that there was no testimony that any of that material was designed, one, to reference to children; second, that it was for any susceptible audience, or to any clearly defined sexual group. And I think it was prejudicial error for the Court to have gone on and to have read that portion of that paragraph, which is not applicable to the facts of this case.

It puts before the jury an element or [275] matters that were not brought forth to this jury by the witnesses in the case.

That also applies to Paragraph (g). There was no evidence as to what that material — you know, whether it was promoted, what it was ever up there for. And, again, that's almost like a pandering. You know, what it was advertised for or whatever as to being obscene.

There was nothing — there was no evidence at all that that particular film was on display or advertised to the public, "Come and buy this; this is an obscene publication," and I don't believe that that —

THE COURT: It's a public building and a public establishment where he makes a livelihood, though. Anyone can —

MR. SIRKIN: It's an adult bookstore, Your Honor. It doesn't mean that everything in there is being sold for the purposes or the allegation that it is obscene. It says sexual — you know, I think Roth versus the United States, Miller versus California, the mere fact that something is sexually explicit does not mean that it's obscene; and if I sell it, unless I put on

there that I am actually promoting it and saying, you know, buy this, this [276] is the most obscene thing you'll ever read or see. There's no evidence that that was involved in this particular case. That puts something before this jury that was not brought before the jury in evidence.

I believe, also, that of the terminology in Paragraphs 1, 2 and 3 of Subsection (a) were not — you know, were not charged in this particular case. He's charged with disseminating; and, specifically, the one provision of dissemination in the indictment that he's charged with, to wit — it says that: To wit, the video The Devil in Miss Jones, by selling said video.

He was not charged with exhibiting it. He was not charged with delivering it, providing, offering, agreeing to sell it, deliver it, or anything. He was not charged with presenting or directing an obscene play; he was not charged with publishing or exhibiting or otherwise making available, but was in fact specifically charged with selling.

We defended this case on the basis of this particular indictment that he was alleged to have sold it; and I think for the Court to —

THE COURT: Disseminated it.

MR. SIRKIN: It says: Disseminating it; to wit. There are a lot of different things in the [277] disjunctive that could have been involved. He didn't charge in the disjunctive. He used the word: He disseminated, and the act of dissemination was, to wit, specifically he sold.

And that I think under due process we were entitled to know specifically if he was going beyond that. There was no evidence of any of these other items —

THE COURT: Well, he —

MR. SIRKIN: — and that was it, he was charged with it.

THE COURT: Of course, he — let's see where the indictment is.

MR. SIRKIN: The indictment says that he knowingly disseminated, and then goes on to say: to wit, the video, by selling. Specifically, that's the part of the dissemination that's applicable, and that's what he has been charged with. He has

not been charged with — and it even goes further by saying Subsection (b) —

THE COURT: Of course, he also — well, he said Subsection (b), but he also goes further, in violation of Section 16-15-305, which is the entire statue, the way I interpret it.

MR. SIRKIN: It says in violation of —

[278] THE COURT: In fact, he alleges that twice.

MR. SIRKIN: Selling is in violation of the statute. That's the specific element —

THE COURT: Well.

MR. SIRKIN: — of dissemination that Mr. Shavalier was charged with. He had his choice. He did not charge him in the disjunctive. He charged him and specifically set forth the act of dissemination that was involved that he intended to prove.

We tried this case on the basis that he was specifically: To wit, sold.

THE COURT: Of course, I'm of the opinion, of course, he — the whole statute is applicable. I'm going to listen to him now.

MR. SIRKIN: If you want me to go on with the rest of —

MR. SINCLAIRE: Your Honor, your charge is one hundred percent in conformity with the evidence presented at trial. Dissemination is used in the indictment. The indictment —

THE COURT: All the way through the law it says dissemination.

MR. SINCLAIRE: Exactly, Your Honor. He had been put on notice as to the exact statute he was charged with —

[279] THE COURT: Yes, sir.

MR. SINCLAIRE: — and the evidence conforms a hundred percent with the charge itself. In addition to that, Your Honor —

THE COURT: What about this corrective —

MR. SINCLAIRE: — we discussed what would be charged to the jury — I'm sorry, I didn't mean to interrupt the Court. We discussed what would be charged to the jury beforehand, and you specifically said two or three times —

THE COURT: Yes, sir, I told them the statute would be in toto, except for the penalties.

MR. SINCLAIRE: And now he would like to come in and say, "Oh, wait a minute," and —

MR. SIRKIN: I don't recall that, Your Honor.

MR. SINCLAIRE: — act like he's really surprised.

MR. SIRKIN: I mean —

THE COURT: You don't recall me telling —

MR. SIRKIN: I remember your saying that you would go into the portions of the statute, but I though that you would read only those portions that were applicable.

THE COURT: I stated that I would charge them the applicable law. I told y'all in conference —

[280] MR. SIRKIN: Applicable law.

THE COURT: — that the whole statute would be charged except the penalty. Now that's what I told you in conference. Now, anything further?

MR. SIRKIN: In relation to where the Court indicated that obscene material is contraband, I don't believe — again, that's not the purpose of this particular case —

THE COURT: It's still a part of this—

MR. SIRKIN: — in setting forth at Subparagraph (i).

THE COURT: It just says it may be seized.

MR. SIRKIN: I don't think —

THE COURT: And that's the law of this state.

MR. SIRKIN: But that's not the law of this case. In addition —

THE COURT: Well, I don't agree with counsel.

MR. SIRKIN: Well. With all due respect —

THE COURT: Anything further?

MR. SIRKIN: Yes, one other —

THE COURT: Other than what I've mentioned.

MR. SIRKIN: As to the objections, and again I would repeat and request that the Court — we had submitted five proposed instructions. I think that the Defendant's Request, as it related to the freedom [281] of expression is fundamental to our system; however, that the constitutional right to free expression does not extend to that which is obscene — I

would indicate to the Court, on numerous occasions, in reference in closing argument, Counsel for the State set forth "the new law, under the new law."

It's been the law of the land that obscene material — and the law of South Carolina — and I think that that instruction, due to the argument that was made by Mr. Sinclaire, is germane and should have been given in this particular case.

The jury ought to know that obscenity has not been protected speech in the State of North Carolina (sic). There have been statutes on the book, and that this is not just a new law dealing — it may have had some differences and changes in the law, but obscene material has been a violation of the law of South Carolina —

THE COURT: That's right.

MR. SIRKIN: — for a number of years.

THE COURT: That's right. I served in the Legislature a long time. I know what that is, the problems they've had over the years.

MR. SIRKIN: As we discussed in conference this morning, that we had requested that the Court [282] give our Requested Jury Instruction Number Two, particularly as —

THE COURT: Well they never were numbered. I got them, but they never were numbered.

MR. SIRKIN: Well I believe they were numbered. Well, I thought that they were — Roman Numerals, Your Honor. I'm not talking about — these are on circumstantial evidence. I'm talking about the ones dealing with the issue of obscenity, Judge. There should be another sheet —

THE COURT: I ruled on these yesterday.

MR. SIRKIN: Well I'm preserving the record.

THE COURT: Oh, yeah. Is this it?

MR. SIRKIN: Yes, sir. And these are numbered. You see, Roman Numeral Number I and Number II.

THE COURT: Well we ruled on these this morning, didn't I?

MR. SIRKIN: Yes, but it wasn't on the record. And all I'm trying to do is make sure that the record reflects, as to Number II, that —

THE COURT: Have you seen these?

MR. SINCLAIRE: Your Honor, if those are the ones that we ruled on earlier today, than I have seen them.

MR. SIRKIN: But I think that I have to repeat [283] them and put them into the record to preserve the issue for an appellate record. The Court of Appeals can only speak by what's in the record. I believe that — I once again would urge the Court to give our Requested Jury Instruction Number II, particularly as it relates to going on the -- the phrase "appeals to the prurient interest" refers to the effect and impact on the average person; that is, whether the material produces a shameful or morbid sexual response and is reflective of an arousal of lewd and lascivious desires and thoughts in the average person.

We would further go on to ask the Court, as it talked about the average person means that you are to judge the material not on the basis of your own individual taste, preference or opinion; or the taste or preference or opinion of other individuals, but rather on the standard of the hypothetical average person in this community.

And that some of the elements that we go on further in that paragraph to set forth, you know, what is to be considered in determining as to contemporary community standards and the hypothetical average person.

We feel that the entire proposed instruction [284] is consistent with the cases of Miller versus California; United States Supreme Court Case, Pinkus versus the United States; another Supreme Court of the United States case, Smith versus the United States; Brocket versus Spokane Arcades, Incorporated; and Pope versus Illinois, which are all Ohio Supreme Court — or United States Supreme Court decisions.

We further would request that the Court go on and — in defining as particularly Defendant's Requested Jury Instruction Number IV, as it relates to the type of scienter and knowledge that is required. And I believe — I believe it was error for the Court to have gone on and read from the statute, and I think I indicated earlier in an argument on the unconstitutionality of the statute, that the type of knowledge

that's required is knowing the content and character of the material that is disseminated, and it has nothing to do with the United States Supreme Court — he's limited to that, and not something to the effect of failing after reasonable opportunity to exercise reasonable inspection, which would have disclosed the character of the material or performance.

And I believe we cited in support of that knowledge requirement the case of Smith versus [285] California, in which there was the concurring opinion of Justice Frankfurter with the United States Supreme Court. It says the reason for the knowledge and knowing the character of the charged material is not to make one a censor or to require that he become familiar with every piece of merchandise dealing with that which is presumptively protected under the law when he puts it out.

And I think that the statute goes beyond and is overbroad, and it should have been limited in what was read or indicated to the jury.

Again, with the Defendant's Requested Jury Instruction Number V, we believe that that's also applicable in this case in the requiring and finding out what is sufficient, that the defendant had knowledge of the character of the charged material, that it's not enough to just merely have sexually explicit material available. And I cited a case out of Illinois, which I think is well spoken, and it's attached to the proposed instructions that I gave to the Court on yesterday.

And I also think that the Court should have instructed the jury that if they could not — it was in Defendant's Requested Jury Instruction Number III — that part of the burden of proof on [286] The State of South Carolina was to prove what the community standards were; and as I've indicated in there that, if they are unable to determine from the evidence the standard of Charleston County, it's their obligation to enter a verdict of not guilty. And I have cited and given to the Court a copy of the decision out of the Supreme — out of the Judicial Court of Massachusetts, which I think is applicable and should be accepted by ths Court. And so therefore —

THE COURT: Of course, you know I haven't had time to read all this.

MR. SIRKIN: Well, Your Honor, I gave those to you yesterday.

THE COURT: Yesterday afternoon, but I was in court here unitl a quarter to six last night, and I was down here this morning at nine o'clock, trying to go over these. And you don't think I was going to stay up all night and read all this all night long, did you? It should have been handed to the Court a long time ago, and I just got them late yesterday — well, yesterday. Yesterday afternoon.

I want to hear you, Mr. Solicitor.

MR. SINCLAIRE: Your Honor, he made a number of different —

[287] THE COURT: Of course, all these briefs. I got about four or five briefs on different ones. I would like to put those in the record, too. I only got them until yesterday.

Memorandum in Support of Admissibility of Evidence Regarding Comparable Materials, and so forth. This looks like here it must have forty or fifty pages, or more. And this one that the reference was just made to, a good another thirty or forty pages of very fine print copies, along with a typed — another brief which was handed me yesterday, Defendant's Brief in Support of Request that the Jury be Instructed to Contemporary Community Standards Are Set By What is Tolerated By the Community. Those I ruled on from the bench. Left the others open.

And, of course, I have — put it in the record right now. I have not had time to look; but I think the rulings I have made are right up to this point. All right.

MR. SINCLAIRE: Your Honor, it's my —

THE COURT: And that is in the record, gentlemen.

MR. SINCLAIRE: Your Honor, it was my —

THE COURT: All right, I want to hear you, [288] Mr. Solicitor.

MR. SINCLAIRE: It was my understanding, Your Honor, that we had in fact discussed each one of these.

THE COURT: Briefly, this morning.

MR. SINCLAIRE: Well we discussed them as defense counsel made them in detail, or went through them one at a time. As far as his motion as far as whether it's tolerated in the community or accepted, he cited the Smith Case which uses both language for acceptance and tolerate; and that which is tolerated — I feel that it is an improper burden on the State to submit a charge to the jury that just because we tolerate something that it is standard — I'm sorry, that it is a contemporary community standard simply because we tolerate something.

I don't believe that that language should be spoken to the jury to infer that, if we tolerate something, that's the contemporary community standard. Tolerating something, I feel, is a much lesser standard than what we find acceptable.

The statute is real clear on that. They just enacted it in October of 1987. It says: As used in this article, community standards, used in [289] determining prurient appeal and patent offensiveness, are the standards of the area from which a jury is drawn.

Nowhere in there do they require the State to show or put upon the State a burden of proof to show what the community standards are. It's riddled throughout the statute itself that jurors are to draw on their own experiences and common sense upon which they base these standards.

It's the same type — had the same problem with this expert from Columbia. He was supposed to know what the community standards were.

I don't feel that it's incumbent on the State to present evidence as to what the community standards are because that's invading the province of the jury.

THE COURT: Anything further, gentlemen? Of course, the motions are denied, and I'm going to submit the case to the jury as I have charged. All right, take the indictment to the jury. Take all the exhibits, and tell them to start their deliberation; and bring the thirteenth juror in.

APPENDIX 4

EXCEPTIONS FILED BY PETITIONER ROBERT D. SHAVALIER

1. The circuit court erred in refusing to charge defendant's Request to Charge No. 1, to wit:

> "Freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression under the First Amendment, which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly. A work is not to be condemned merely becuase it includes nudity or the portrayal of sexual activity. However, the constitutional right to free expression does not extend to that which is "obscene".
>
> "But as the Supreme Court of the United States has held:
>
> "[S]ex and obscenity are not synonymous . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.
>
> "*Roth* v. *United States*, 354 U.S. 476, 487 (1957)."

This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

2. The circuit court erred in refusing to charge defendant's Request to Charge No. 2, to wit:

"I will now instruct you on the definition of obscenity. The definition establishes a three-pronged test for obscenity and all three prongs of that test must be established beyond a reasonable doubt before material may be found obscene.

"The first prong of the test for obscenity is whether the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest.

"As here used, "prurient interest" means a shameful or morbid interest in sex and is reflective of an arousal of lewd and lascivious desires and thoughts.

"The phrase "appeals to the prurient interest" refers to the effect or impact on the average person, that is, whether the material produces a shameful or morbid sexual response and is reflective of an arousal of lewd and lascivious desires and thoughts in the average person.

"The fact that one portion or scene of a work may have some appeal to the prurient interest of the average person is not sufficient. Rather, the dominant theme of the work — that is, the work taken as a whole— must appeal to the prurient interest of the average person.

"Use of the term "average person" means that you are to judge the material not on the basis of your individual taste, preference or opinion, or on the taste, preference or opinion of any other individual person. Rather, you shall judge the material by the standard of the hypothetical average adult person in the community. Children are not to be included in determining the standard of the average adult person.

"Whether the material, taken as a whole, appeals to the prurient interest of the average person of the community as a whole is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average and nor-

mal attitude toward, and interest in, sex. Contemporary community standards; in turn, are set by what is tolerated in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the work impresses an individual juror; rather, the work must be judged by its impact on the average person.

"Therefore, the first prong of the test to be applied in determining whether given material is obscene is whether the material, taken as a whole, appeals to the prurient interest of the average person, applying contemporary community standards.

"The second prong of the test for obscenity is whether the material depicts or describes, in a patently offensive way, sexual conduct of the following kinds: vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted, and masturbation. In judging whether those types of sexual conduct are depicted or described in a patently offensive way, however, you must not condemn by your own standards, if you believe them to be stricter than those generally held; and you must not excuse by your own standards, if you believe them to be more tolerant than those generally held. Rather, you must measure whether the material is patently offensive by contemporary community standards.

"Patently offensive means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

"Contemporary community standards, as stated before, are those established by what is generally tolerated in the community as a whole; that is to say, by society at large or people in general; and not by what some groups of persons may believe the community as a whole ought to tolerate or refuse to tolerate. It is a matter of common knowledge that

customs change and that the community as a whole may from time to time find tolerable that which was formerly intolerable.

"The third prong of the test for obscenity is whether the material, taken as a whole, lacks serious literary, artistic, political and scientific value. An item may have serious value in one or more of these areas even though it portrays explicit sexual conduct, in which event the item would not be obscene under the law.

"The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in the material, but whether a *reasonable person* would find such value in the material as a whole.

"Those, then are the three prongs of the test for obscenity. All three of the prongs must be established beyond a reasonable doubt before the material in question can be found to be obscene. If any one of them is not met, the material would not be obscene within the meaning of the law.

"*Miller* v. *California*, 413 U.S. (1973); *Pinkus* v. *United States*, 436 U.S. 293 (1978); *Smith* v. *United States*, 431 U.S. 291 (1977); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 (1985); *Pope* v. *Illinois*, ____ U.S. ____, 107 S.Ct. 1918, 1921 (1987); § 16-15-305 of the South Carolina Code of Laws (1976) as amended."

This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

3. The circuit court erred in refusing to charge defendant's Request to Charge No. 3, to wit:

"If you cannot determine from the evidence what the standards of Charleston County, South Carolina, are in regard to explicit sexual material, you must find the Defendant not guilty.

"*Commonwealth* v. *Trainor*, 374 N.E.2d 1216, 1219 (Supreme Judicial Court of Massachusetts, 1978) (copy attached)."

This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

4. The circuit court erred in refusing to charge defendant's Request to Charge No. 4, to wit:

> "One of the essential elements the prosecution must prove beyond a reasonable doubt is the element of *scienter* or knowledge; that is, at the time of the alleged offense, the Defendant had knowledge of the character of the charged materials. If you find that the prosecution has not proven beyond a reasonable doubt that, at the time of the alleged offense, the Defendant knew the character of the charged materials, then you must find the Defendant not guilty.

"*Smith* v. *California*, 361 U.S. 147 (1959); *Hamling* v. *United States*, 418 U.S. 87 (1974); § 16-15-305 of the South Carolina Code of Laws (1976) as amended."

This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

5. The circuit court erred in refusing to charge defendant's Request to Charge No. 5, to wit:

> "I instruct you that proof that the Defendant knew that x-rated or adult motion pictures were available for sale at the place where the offense allegedly occured is not, by itself, sufficient to prove that the Defendant had knowledge of the character of the charged material. Thus, if you find that there was no additional credible evidence presented tending to show the Defendant's knowledge of the character of the charged material, then you must find the Defendant not guilty. If, on the other hand, you find that there was additional credible evidence presented tend-

> ing to show the Defendant's knowledge of the character of the charged material, you still must decide whether, upon consideration of all of the evidence, you are convinced beyond a reasonable doubt that the Defendant, in fact, knew the character of the charged material at the time of the alleged offense.

"*Illinois* v. *Hart*, 101 Ill.App. 3d 343, 427 N.E.2d 1352 (2d Dist. 1981 — copy attached)."

This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

6. The circuit court erred in failing to dismiss the prosecution and to quash the indictment upon the ground that Section 16-15-305 is unconstitutionally overbroad in violation of the First Amendment and the Due Process Clause of the Fourteenth Amendment. This was error because Section 16-15-305 allows conviction without proof that the defendant had actual knowledge of the obscene nature of the material sold, in violation of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

(2)

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No. 90-1285

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October Term, 1990

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Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the trial judge err in refusing to instruct the jury as to Petitioner's Requested Jury Instruction No. III?

II.

Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. IV?

III.

Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. II?

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RESPONDENT'S BRIEF IN OPPOSITION

Opinion Below

The Memorandum Opinion of the South Carolina Supreme Court, dated November 20, 1990, is reproduced in Petitioner's Appendix 1 to Petition for Writ of Certiorari, at App. pp. 1a-2a.

Jurisdiction

The Memorandum Opinion of the South Carolina Supreme Court was filed on November 20, 1989. This Court's jurisdiction was

invoked by Petitioner pursuant to 28 U.S.C. § 1257(a). Respondent respectfully maintains, however, that Petitioner has not satisfied the burden of proof in establishing this Court's jurisdiction, with respect to Question II and Question III.

STATEMENT OF THE CASE

Petitioner, the owner of Big Time Video in North Charleston, South Carolina, was convicted of disseminating an obscene videotape, in violation of S.C. Code Ann. § 16-15-305 (Supp. 1990). His conviction arose out of the sale of a copy of "The Devil in Miss Jones" to an undercover officer. On direct appeal, the South Carolina Supreme Court issued a Memorandum Opinion, affirming Petitioner's conviction. State v. Robert D. Shavalier, Op. No. 90-MO-292 (S.C. Sup.Ct. filed Nov. 20, 1990).

The State's evidence revealed that Agent John Andrew Ramey, III, is a Special Agent employed by the South Carolina Alcoholic Beverage Control Commission. His primary duty is the enforcement of Title 61 of the South Carolina Code of Laws. His secondary function is to assist any and all law enforcement agencies in Charleston, Dorchester, and Berkeley Counties. On March

16, 1988, Agent Ramey was contacted by Detective Phillip Glenn, of the City of North Charleston Police Department's Vice Enforcement Unit. Detective Glenn asked Agent Ramey if he would go into Big Time Video, at 4813 Rivers Avenue in North Charleston,[1] and purchase a copy of a videotape entitled "The Devil in Miss Jones." (Tr. p. 21, line 9 - p. 22, line 21; p. 36, line 1 - p. 38, line 6). Agent Ramey arrived at Big Time Video around 8:55 p.m. Immediately to Agent Ramey's left as he walked into the establishment, he saw a small display case. The cash register sat upon this display case and the person running the establishment stood behind it. Inside of the display case, was an assortment of dildos, vibrators and

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[1]This address is apparently near the City of North Charleston Police Department. (Tr. p. 35, lines 17-20). It should be noted that all citations in the Brief in Opposition are to the transcript of Record filed in the South Carolina Supreme Court.

lubricants associated with the use of such devices. On one wall were at least one dozen more of such devices. The wall in front of Agent Ramey contained various magazines; in the center of the room was a display area (which had books, magazines and other items); and, on the wall to the right, were videotapes of various movies. A sign advertised that there were 250 tapes available, and Agent Ramey estimated there were probably that many in the store. There were two other doorways in the store. Each of these led to approximately six or more small video movie booths, where a customer could watch a movie for $.25. The lighting in these booths was very poor. Agent Ramey did not see any material in Big Time Video that was not sexually oriented. (Tr. p. 22, line 22 - p. 28, line 8; p. 28, lines 15-16; p. 29, lines 10-13; p. 33, lines 21-24).

After briefly walking through the store, Agent Ramey approached the man

running the store,[2] and expressed his interest in purchasing "The Devil in Miss Jones." The man pointed at the wall containing the videotapes. Agent Ramey searched for the tape, but was unable to locate it. He again asked the man for the tape. The man walked around the counter, removed the tape from the wall, and asked whether Agent Ramey wished to rent it. Agent Ramey replied that he wanted to purchase the tape and the man rang up a sale on his cash register. The total cost was $73.45 (approximately $3.50 of which went to State sales tax). The man refused, however, to give a receipt to Agent Ramey and assured Agent Ramey that he would take care of any problems with the tape, should they arise. (Tr. p. 22, line 24 - p. 23, line 3; p. 27, lines 6-11; p. 28, line 12 - p. 30, line 7;

---

[2]The man was described as a white male, in his late forties or early fifties. He was approximately 5'7" to 5'9" tall, and weighed between 200 and 230 pounds.

p. 33, lines 18-24).

It was stipulated that the telephone billing for Big Time Video went to Petitioner, at the store's address. Likewise, both the 1987 and 1988 business licenses for Big Time Video listed Petitioner as the owner thereof. (See State's Exhibits 26, 27 and 28). Also, the individual South Carolina income tax return (State's Exhibit 29) filed for Petitioner and his wife listed the business as Petitioner's. (Tr. p. 42, line 8 - p. 44, line 4).

Both the videotape (State's Exhibit 31) and the box in which it was originally packaged were introduced at trial. The videotape of "The Devil in Miss Jones" was played in its entirety for the jury. (Tr. p. 30, line 12 - p. 32, line 9; p. 44, lines 15-16).

The box (State's Exhibit 30) contains still pornographic photographs taken from

the movie, as well as advertising indicative of the movie's content. The movie "The Devil in Miss Jones" begins with the principal actress, a virgin, committing suicide. When later granted a momentary reprieve from Hell, the principal actress engages in various forms of vaginal, oral and anal intercourse, with one or more partners. For example, there is one scene in the movie which involves two men and this actress. In that scene, the actress engages in vaginal and anal intercourse, simultaneously. In another scene she appears with another female, as well as a male. There is yet another scene in which the principal actress simulates fellatio on a banana, after she has inserted the banana into her vagina. In the same scene, she allows a snake to crawl over her body. Then, she sticks the head of the snake into her mouth. In the very next scene, the actress states "...it's just that for the

first time in my life,...or for the first time, I've found contentment."

Petitioner offered the expert testimony of Dr. Clay Perry Drummond, a clinical psychologist who specializes in "Behavioral Medicine, Sex Therapy and Pain Management." It was Dr. Drummond's opinion, based upon a viewing of "The Devil in Miss Jones" and a study of S.C. Code Ann. § 16-15-305 (Supp. 1990) that the movie does not appeal to the "prurient interest" of the average person. (State's Exhibit 49, line 25 - p. 52, line 22).

On cross-examination, Dr. Drummond opined that it could appeal to a normal, healthy interest in sex for a woman to scream "Hurt me! Hurt me!" over and over again.[3] Dr. Drummond also stated that lesbianism appeals to a normal and healthy

---

[3]Respondent would note that the principal actress in the movie is engaging in anal intercourse at the time she is screaming this. (State's Exhibit 31).

interest in sex. Finally, although he was hesitant to answer the question at first, Dr. Drummond stated that it appealed, if at all, to a normal, healthy interest in sex for a woman to remove a device from her anus and place it in her mouth.[4] (Tr. p. 53, line 1 - p. 55, line 4).

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[4]Dr. Drummond gave a similar response with respect to the actress' sticking the head of a live snake into her mouth. (Tr. p. 56, line 15 - p. 57, line 9).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The trial judge properly refused to instruct the jury as to Petitioner's Requested Jury Instruction No. III, since the trial judge's jury charge correctly stated the applicable law and the substance of the requested instruction was contained in the charge, as given.

Petitioner initially claims the trial judge's refusal to instruct the jury as to his Requested Jury Instruction No. III (see Appendix to Petition at p. 7a) denied him due process. Citing State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983), the South Carolina Supreme Court affirmed Petitioner's claim on direct appeal. Because the substance of the requested instruction was contained in the jury instruction, as given by the trial judge, and because the trial judge's instruction adequately and correctly stated the applicable law, this Court should

not grant the Petition.

The trial judge refused to charge the jury, verbatim, in accordance with Petitioner's requested jury instruction, since he believed that the charge which he was going to give the jury adequately covered Petitioner's requests. (Tr. p. 58, lines 1-15). Thereafter, the trial judge charged the jury. Before the trial judge instructed the jury in regard to S.C. Code Ann. § 16-15-305 (Supp. 1990), he charged the jurors with respect to Petitioner's presumption of innocence and the fact the State had the burden of proving Petitioner guilty beyond a reasonable doubt. He also instructed the jury that Petitioner was entitled to any reasonable doubt arising out of the whole case, or any defenses that Petitioner may have presented; and, if there was such a reasonable doubt, the jury must give such a reasonable doubt to Petitioner. Under such circumstances, the jury would

have the duty to acquit Petitioner. (Tr. p. 58, line 23 - p. 62, line 18).

Subsequently, the trial judge instructed the jury on the South Carolina law relating to the dissemination of obscenity. In so doing, he read from § 16-15-305, verbatim. Specifically, the trial judge charged the jurors that:

> Now, ladies and gentlemen, the defendant in this case, of course, has been charged in the indictment, which you will have in the jury room, with the crime of dissemination of obscene material. And, of course, our Legislature has saw fit (sic) to pass a statutory law in regard and regarding the dissemination of obscene material in this state.
>
> Section 16-15-305 states that: It is unlawful for any person knowingly to disseminate obscenity. A person disseminates obscenity within the meaning of the article if he:

[(A)](1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or description of the obscene.

(2) Presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene.

(3) Publishes, exhibits or otherwise makes available anything obscene to any group or individual, or

(4) Exhibits, presents, rents, sells, delivers or provides or offers or agrees to exhibit, present, rent or to provide any motion picture, film, film strip or projection slide, or sound recording, sound tape or sound track, video tapes and recordings, or any matter or material of whatsoever form which is a representation, description, performance or publication of the

obscene.

[(B)] For the purpose of this article any material is obscene if,

(1) For the average person, applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct, specifically defined by Subsection (c) of this section--which I will get to in a minute or two.

(2) The average person, applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex.

(3) To a reasonable person the material, taken as a whole, lacks serious literary, artistic, political or scientific value, and

(4) The material, as used, is not otherwise protected or privileged under the Constitution of the United States or of this state.

[(C)] As used in this article,

(1) Sexual conduct means

(a) Vaginal, anal or oral intercourse, whether actual or simulated, normal or perverted, whether between human beings, animals or a combination thereof.

(b) Masturbation, excretory functions of a lewd examination--or exhibition--vulva or female breast nipples, including male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernible turgid state.

(c) An act or condition that depicts actual or simulated bestiality, sadomasochistic abuse, meaning flagellation or torture upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples or the condition of being fettered, bound or otherwise physically

restrained on the part of the one so clothed.

(d) An act or condition that depicts actual or simulated touching, caressing or fondling of or other similar physical contact, whether covered or exposed genitals, pubic or anal regions or female breast nipples, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an actual or--in an act of actual or apparent sexual stimulation or gratification; or

(e) An act or condition that depicts the insertion of any part of the person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done in part as a recognized medical procedure.

(2) Patently offensive means obviously and clearly distinguishable, objectionable, repugnant, displeasing, distasteful or obnoxious to contemporary standards of

decency and the propriety within the community.

(3) Prurient interest means a shameful or morbid interest in nudity, sex or excretion, and is reflective of an arousal of lewd, lascivious desires and thoughts.

(4) Person means any individual, corporation, partnership, association, firm, club or other legal or commercial entity.

(5) Knowingly means having general knowledge of the content of the subject material or performance, of failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance.

[(D)] Obscenity must be judged with reference to ordinary adults, except that it must be judged with reference to children or other especially susceptible audiences or clearly

defined deviant sexual groups, if it appears from the character of the material or the circumstances of its dissemination to be-- excuse me. I want to make a note here. If it appears from the character of the material or directed to children or such audiences or groups.

[(E)] As used in this article, community standards used in determining prurient appeal and patent offensiveness are the standards of the area from which the jury is drawn.

[(F)] It is unlawful for any person knowingly to create, buy, procure or possess obscene material with the purpose and intent of disseminating it.

[(G)] It is unlawful for a person to advertise or otherwise promote the sale of material represented or held out by them as obscene.

I charge you further that obscene material, of course, disseminated, procured or promoted in violation of this section is also contraband

> and may be seized by the appropriate law enforcement authorities.
>
> Now, ladies and gentlemen, that is the statutory law, of course, of this state. And, of course, I have charged you that law.

(Tr. p. 67, line 19 - p. 72, line 23). Also, when the jury requested supplemental instructions on two occasions, the trial judge re-charged the jurors on the definition of "prurient interest" (Tr. p. 96, lines 18-25) and the three-prong test of Miller v. California, 413 U.S. 15 (1973) as set forth in § 16-15-305(B). (Tr. p. 100, line 11 - p. 101, line 10).[5]

It is well settled that a state has the authority to regulate obscene materials because such materials are outside the scope of protection afforded by the First Amendment. Miller v. California, supra; Beigay v. Traxler, et al., 790 F.2d 1088

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[5]The trial judge's jury instructions are also reprinted in the Appendix to Petitioner's Petition for Writ of Certiorari. See App.3 at pp. 10a-29a.

(4th Cir. 1986); State v. Barrett, 278 S.C. 92, 292 S.E.2d 590, cert. denied, 459 U.S. 1021 (1982).

Likewise, it is generally held that "where a requested charge is fully and fairly covered by the trial judge's general charge, refusal of a requested instruction is not error." State v. Barwick, supra. See also Henderson v. Kibbe, 431 U.S. 145 (1977); United States v. Hansen, 701 F.2d 1215 (7th Cir. 1983); United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); United States v. Solomon, 686 F.2d 863 (11th Cir. 1982); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) (Gregory, C.J., dissenting). Further, there is no requirement that any specific language be charged. It is sufficient to charge the substance of the law in plain and clear terms. Cupp v. Naughten, 414 U.S. 141 (1973); State v. Rabon, 275 S.C. 459, 272

S.E.2d 634, 636 (1980).

The request-to-charge at issue would have required the jury to find Petitioner not guilty if the jurors could not "determine from the evidence what the standards of Charleston, South Carolina are in regard to explicit sexual material...." (Tr. p. 109, App. 3 at p. 7a). Because Respondent is not required to present evidence of what contemporary community standards are [see United States v. Hamling, 418 U.S. 87, 104 (1974)], Petitioner claims that in the absence of the requested instruction, the charge may have shifted the burden of proof to Petitioner, as to what the contemporary community standards are. Respondent disagrees and submits that this argument ignores the charge given by the trial judge.

Assuming without conceding that Petitioner's requested Jury Instruction No. III is a proper statement of both

constitutional and South Carolina law, there still was no error. The trial judge's charge covered the substance of Petitioner's request-to-charge. Therefore, it was not error for the trial judge to deny Petitioner's requested instruction. United States v. Skinner, supra; United States v. Solomon, supra; State v. Barwick, supra.[6] In particular, the trial judge instructed the jury that the State bore the burden of proof as to each element of the offense charged and that the State had to prove such element beyond a reasonable doubt. He also instructed the jury on the presumption of innocence (referring to it as a "robe of righteousness") and the fact a defendant is

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[6]Despite Petitioner's claim to the contrary, there was no evidence introduced at trial which would shed any light on what the appropriate community standards should be in Petitioner's case. Rather, Dr. Drummond merely testified that "The Devil in Miss Jones" did not appeal to a prurient interest in sex when measured by these standards. (Tr. p. 51, line 12 - p. 57, line 9).

never required to prove himself innocent. (Tr. p. 58, line 23 - p. 62, line 1).

Next, the trial judge instructed the jury that:

> I charge you that the defendant is entitled to any reasonable doubt arising out of the whole case, or arising out of any defenses that may have been set up by him.
>
> If upon the whole case you have a reasonable doubt as to the guilt of the defendant, you must give him the benefit of that doubt; and under those circumstances he would be entitled to an acquittal at your hands.

(Tr. p. 62, lines 1-9). (Emphasis added).

Notwithstanding Petitioner's assertions to the contrary, Respondent submits the trial judge's instructions did not result in unconstitutional burden shifting. It is generally presumed that jurors listen to and understand jury instructions given by a trial judge. Francis v. Franklin, 471 U.S.

307 (1985). Nor would a reasonable juror, hearing the trial judge's charge in this case, conclude that Petitioner had the burden of proof of any element of the offense charged. To the contrary, the only reasonable understanding of the jury instruction is that the State had the burden to prove each element of the offense charged and that Petitioner had no burden of proof, whatsoever. Moreover, if the juror(s) had a reasonable doubt arising out of the whole of the case, or any defense(s) presented, that doubt had to be resolved in Petitioner's favor and the jury had to acquit him.

As to Petitioner's assertion that there was no framework provided for defense counsel's closing argument (see Petition at p. 14), Respondent submits that argument is not properly before this Court because Petitioner did not present the same argument to the South Carolina Supreme Court. This Court has consistently held that it does not

have appellate jurisdiction over a state supreme court as to issues which were not presented to that court. See, e.g., Bailey v. Anderson, 326 U.S. 203, reh. den., 326 U.S. 691 (1945); Charleston Federal Sav. & Loan Assoc. v. Alderson, 324 U.S. 182, reh. den. 324 U.S. 888 (1945); United States Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Murdock v. Memphis, 87 U.S. 590 (1875).

Therefore, the Petition for Writ of Certiorari should not be granted. Although the trial judge did not grant the requested jury instruction, he did cover the substance of the requested charge in his jury instructions. Further, the charge, as given, fully and correctly stated both South Carolina law, as well as the applicable federal constitutional law. Thus, there was no error. See United States v. Skinner, supra; State v. Barwick, supra.

II.

This Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. IV[7] because a state court's decision rests upon an adequate and independent state procedural ground.

Next, Petitioner claims the trial judge erred because he refused Petitioner's Requested Jury Instruction No V because, he claims, the trial judge's instruction as to the necessary scienter requirement violates the First and Fourteenth Amendments. Respondent submits this Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to entertain the constitutional challenge since the state supreme court's decision on this issue rests upon an

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[7]In the Petition, Petitioner erroneously refers to this as Requested Jury Instruction No. V, but it is, in fact, No. IV (See App. 3 at p. 8a.

adequate and independent state procedural ground. Furthermore, to the extent this Court finds that it does have appellate jurisdiction, Respondent submits there was not error. Rather, the trial judge's instructions correctly stated South Carolina law, and the relevant principles of federal constitutional law.

> The circuit court erred in refusing to charge defendant's Request to Charge No. 4 to wit:
>
> > One of the essential elements the prosecution must prove beyond a reasonable doubt is the element of <u>scienter</u> or knowledge; that is, at the time of the alleged offense, the Defendant had knowledge of the character of the charged materials. If you find that the prosecution has not proven beyond a reasonable doubt that, at the time of the alleged offense, the Defendant knew the character of the charged materials, then you must find the Defendant not guilty.

> Smith v. California, 361 U.S. 147 (1959); Hamling v. United States, 418 U.S. 87 (1974); § 16-15-305 of the South Carolina Code of Laws (1976) as amended.
>
> This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

(Tr. p. 115).

In its Memorandum Opinion, the South Carolina Supreme Court affirmed this Exception, citing Hunter v. State, 271 S.C. 48, 244 S.E.2d 530 (1978) noting parenthetically that "arguments in brief which are not supported by exception are not properly before the Court." (App. 1, at pp. 1a-2a). The State submits this holding is a plain statement of a non-federal, state procedural bar. See Harris v. Reed, ___U.S.___, 109 S.Ct. 1039 (1989).

This Court has no supervisory jurisdiction over state courts. Chander v. Florida, 449 U.S. 560, 570 (1981). Therefore, the Court will decline to review

state court decisions which rest upon independent and adequate state grounds. Id. See also, Michigan v. Long, 463 U.S. 1032 (1983); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Henry v. Mississippi, 379 U.S. 443, 446 (1964), reh. denied, 380 U.S. 926 (1965). In Michigan v. Tyler, 436 U.S. 499 (1978), the Court cited Henry v. Mississippi, supra, and stated "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court...." Id. at 512, n.7.

The State procedural bar at issue was formerly codified in South Carolina Supreme Court Rule 4, § 6. Further, it has been applied, consistently, in non-capital cases. See, e.g., State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986); State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980); State v. Mitchell, 261 S.C. 452, 200 S.E.2d

448 (1973); Odom v. County of Florence, 258 S.C. 480, 189 S.E.2d 293 (1972). Nor is the plain statement of the state procedural bar unclear in any way. Contra Caldwell v. Mississippi, 472 U.S. 320 (1985).

Therefore, the State submits this Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) as to Petitioner's Question II, since the state court's decision relied upon an independent and adequate state ground, which was plainly stated in the opinion. Harris v. Reed, supra; Michigan v. Long, supra; Fox Film Corp. v. Muller, supra.

Moreover, even assuming arguendo this Court finds that it does have appellate jurisdiction, the State submits there was no error. The definition of "knowingly" found in § 16-15-305(C)(3) is constitutional. Also, Petitioner's request to charge did not accurately state South Carolina law.

Both the South Carolina Supreme Court and the Fourth Circuit Court of Appeals have

upheld the constitutionality of this definition of "knowingly." In State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549, 554 (1975), the court rejected an identical argument to that presented by Petitioner and held that the definition of "knowingly" in § 16-15-305(C)(3) "meets the constitutional requirement of scienter as a prerequisite to prosecutor." Similarly, the Fourth Circuit Court of Appeals upheld the constitutionality of this definition in Beigay v. Traxler, supra. Therefore, to the extent that Petitioner's request-to-charge did not follow the definition of "knowingly" found in § 16-15-305(C)(5), it was not a proper statement of South Carolina law, and there was no duty to charge it. State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977).

Nor is a different standard of intent required by Smith v. California, 361 U.S. 147 (1959) or any other decision of this

Court. This Court in Smith merely held that a state may not constitutionally eliminate a scienter requirement altogether. Id. at 153. See also Hamling v. United States, 418 U.S. 87, 121-125 (1974); Rosen v. United States, 161 U.S. 29 (1896). Yet, all that is constitutionally required is that a defendant be, in some manner, aware of the character of the material involved. See Ginsberg v. New York, 390 U.S. 629 (1968); Com. v. Dane Entertainment Services, Inc. (No. 1), 23 Mass. App. Ct. 1017, 505 N.E.2d 892 (1987); Mishkin v. New York, 383 U.S. 502 (1966); Rosen v. United States, supra. See also Hamling v. United States, supra.

Under Miller, states are thus free to pass obscenity statutes which vary greatly in the necessary scienter requirement. See e.g., Mishkin v. New York, supra (in some manner aware of character); Com. v. Dane Entertainment Services, Inc., supra (general awareness of character of material; State v.

Summers, 692 S.W.2d 439 (Tenn. Cr. App. 1985) (defendant had actual or constructive knowledge of contacts). See also, e.g., American Booksellers Ass'n, Inc. v. Randall, 332 Pa. Super 537, 481 A.2d 919 (Pa. Super. 1984) (reasonably should have known); People v. Wiseman, 129 Mich. App. 258, 341 N.W.2d 494 (Mich. App. 1983); Gotlieb v. State, 406 A.2d 270 (Del. 1979); Dixie Books, Inc. v. State, 147 Ga. App. 593, 249 S.E.2d 634 (1978).

Therefore, even assuming arguendo this Court finds that it does have appellate jurisdiction, the South Carolina definition of "knowingly" is constitutional, State v. Thompkins, supra. See also Mishkin v. New York, supra, and the trial judge's instructions were proper. Thus, this Court should deny the Petition.

III.

This Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. II because the State court's decision rests upon an adequate and independent state procedural ground.

Finally, Petitioner claims that the trial judge erred by instructing the jury, verbatim from § 16-15-305. He asserts this charge violated the First and Fourteenth Amendments to the United States Constitution since it permitted the jury to determine the effect of the allegedly obscene material upon an "ordinary" rather than an "average" member of the community. Petitioner also maintains that it was error to deny his Requested Jury Instruction No. II.

Initially, the State submits, for the reasons advanced in Question II, that this Court lacks appellate jurisdiction under 28

U.S.C. § 1257(a). In affirming Petitioner's conviction, the South Carolina Supreme Court clearly relied upon the procedural bar in Rule 4, § 6, and State v. Hunter, supra. While the state court did cite a case (State v. Barwick, supra) indicating the issue was without merit, this does not affect the independent nature of the procedural bar. Fox Film Corp. v. Muller, supra; Harris v. Reed, ___ U.S. ___, 109 S.Ct. 11044 n. 10. Thus, this is an adequate and independent state law ground and this Court lacks appellate jurisdiction. Id. Michigan v. Long, supra.

Furthermore, even assuming for purposes of argument that this Court finds it has appellate jurisdiction, the State submits there was no error, and the Petition should be denied because the trial judge's instructions correctly stated the applicable law. Also, the substance of the request-to-charge is contained in the trial judge's

jury instructions, as given.

A review of Petitioner's request-to-charge shows that the charge, as given, substantially covers the material in Petitioner's Request Jury Instruction No. II. (Compare Tr. p. 67, line 19 - p. 72, line 23; p. 96, lines 18-25; p. 100, line 11 - p. 101, line 10; with (Tr. pp. 107-109; Tr. pp. 111-114). See also § 16-15-305(B), (C), (D) and (E). Because the trial judge's instructions covered the substance of Petitioner's requested charge, his refusal to charge the jury pursuant to this request-to-charge was not error. State v. Barwick, supra; State v. Rabon, supra.

Before charging the jury, the trial judge informed both counsel for the State and defense counsel that he planned to charge § 16-15-305 in its entirety. Petitioner did not raise any objection at this time. Instead, he waited until the trial judge had completed his jury

instructions. (Tr. p. 58, lines 1-15; p. 76, line 25 - p. 83, line 4). To give the requested instruction at this point would not have served any purpose other than to needlessly confuse the jury, particularly since the substance of Petitioner's request-to-charge was contained in the trial judge's instructions. See State v. Simmons, supra, (trial judge not required to give requested jury instruction that is misleading or confusing). Because Petitioner's own conduct contributed to any alleged error which may have resulted, he could not complain on direct appeal. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Logan, 279 S.C. 345, 306 S.E.2d 622 (1983); State v. Worthy, 239 S.C. 465, 123 S.E.2d 835 (1962).

Petitioner claims that parts of § 16-15-305 were simply inapplicable and, therefore, they may have misled or confused the jury.

Respondent submits that any irrelevant portion of the statute which might have been charged was mere surplusage. Thus, the inclusion of this language in the trial judge's jury instructions was harmless error, because it was non-prejudicial. To the extent that there was no such evidence, the jury could simply disregard this portion of the trial judge's jury charge. The contested language is, therefore, harmless surplusage. As such, its inclusion constituted harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Rose v. Clark, 478 U.S. 570 (1986).

Petitioner also attacks the use of the word "ordinary" person in § 16-15-305(D). This claim, which was rejected by the Fourth Circuit Court of Appeals in Beigay v. Traxler, supra, is simply without merit. As noted by the court in State v. Barrett, the Miller court stated:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.

278 S.C. 92, ____, 292 SE.2d 590, 591, cert. denied, 459 U.S. 1021 (1982). Miller simply does not require the type of precision Appellant demands. Rather, as noted by the Fourth Circuit Court of Appeals, "unavoidable imprecision is not fatal and celestial precision is not necessary." Hart Book Stores, Inc. v. Edminster, 612 F.2d 812, 833 (4th Cir. 1979) cert. denied, 447 U.S. 929 (1980), quoted in Beigay v. Traxler, 790 F.2d at 1093. See also State v. Barrett, supra.

Therefore, this Court should deny the Petition for Writ of Certiorari. Even assuming this Court has appellate jurisdiction, there was no error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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